KHOO KAY POR v. OOI EAN KWONG & ANOR.

[O.C.J. (Arulanandom J.) October 14, 1978]

[Penang — Election Petition No. 4 of 1978]

Election — Election Petition — Allegation that name of nominee not stated in nomination papers — Form and substance — Name omitted only at one place — Election (Conduct of Elections) Regulations, 1959, regs. 4, 5 and 7 — Election Offences Act, 1954, ss. 36 and 37.

Interpretation of Statutes — Forms — Substantial Compliance — Purpose of Legislation — Interpretation Act, 1967, s. 62.

The nomination papers of the petitioner had been rejected on the ground that the name of the nominee was omitted. The name of the nominee was stated in a number of places in the nomination papers but in the space after the words "Signed by the said nominee" instead of giving his name the candidate put his signature. The petitioner brought the election petition to declare the election void and for consequential reliefs. The deposit for costs was paid in the first instance into court.

Held: (1) the omission of the candidate to fill up his name in one space in this case did not have have any substantial effect and was not calculated to mislead. The nomination of the petitioner was therefore wrongly rejected and the election held must be declared void and of no effect;

(2) as no person had been appointed by the Chief Justice to act as proper officer to receive the deposit, the petitioner was justified in paying the deposit into court. The security was deposited with the government and in case the petition was dismissed, there was no danger that the respondent would not receive his costs.

Cases referred to:-

(1) *Abdul Karim* v. *Mohamed Taib & Anor.* [1969] 2 M.L.J. 72.

(2) *Nothman* v. *Barnet London Borough Council* [1978] 1 W.L.R. 200.

ELECTION PETITION.

O.L. Phipps (*K. Vijayanathan* with him) for the petitioner.

Karpal Singh (*S.P. Annamalai* with him) for the first respondent.

Stanley Isaacs (Federal Counsel) for the second respondent.

Cur. Adv. Vult.

Arulanandom J.: This is a petition brought under the Election Offences Act, 1954 (Revised-1969) (Act 5) to declare the election of Ooi Ean Kwong the first respondent in this Petition to the State Assembly seat of Kampung Kolam at the last State Elections in this State null and void and that the declaration by the returning officer, the second respondent, of the first respondent as a duly elected member of the State Constitutency of Kampung Kolam invalid and for further prayers for consequential reliefs.

The history of the case is very simple and well-known. The petitioner filed his nomination papers under the Election (Conduct of Elections) Regulations, 1959. His nomination papers were rejected by the Returning Officer under Regulation 7 paragraph (4) of the said Regulations. For purposes of clarity I shall read the Regulation which empowers the Returning Officer to decide whether any objection to a nomination paper is valid or not. Regulation 7 paragraph (1) reads as follows:—

"7. (1) Objection may be made to a nomination paper by any person whose name appears in the electoral rolls for the constituency and by any candidate for the constitutency on all or any of the following grounds but on no other ground, namely —

(a) that the description of the candidate is insufficient to identify that candidate;

(b) that the nomination paper does not comply with or was not delivered in accordance with the provisions of these Regulations;

(c) that it is apparent from the contents of the nomination paper that the candidate is not capable of being elected a member of the Dewan Ra'ayat or a State Legislative Assembly;

(d) that the provisions of paragraph (1) of regulation 5 of these Regulations have not been observed;

(e) that the candidate is disqualified from being a member under the provisions of the Constitution of Malaysia in the case of an election to the Dewan Ra'ayat or of the Constitution of the State concerned in the case of an election to a State Legislative Assembly."

Paragraph (1) of Regulation 5 deals with the deposits to be made by candidates and reads as follows:—

"5. (1) A candidate, or some person on his behalf, shall deposit or cause to be deposited with the returning officer, or with a Government department authorised by the returning officer in that behalf between the date of the issue of the writ referred to in regulation 3 of these Regulations and twelve noon on the day of nomination, the sum of five hundred dollars in legal tender in the case of an election to the Dewan Ra'ayat or the sum of two hundred and fifty dollars in legal tender in the case of an election to a State Legislative Assembly. On receipt of legal tender from a candidate the returning officer shall proceed in accordance with the current Government financial regulations. Where a deposit of the said legal tender is made with a Government department authorised by the returning officer, the candidate shall between ten o'cock in the forenoon and twelve noon on the day of nomination, produce to the returning officer a deposit receipt. In default of such deposit being so made to the returning officer or such deposit receipt from a Government department being produced, the candidate shall be deemed to have withdrawn his candidature under regulation 9 of these Regulations. The sum so paid by the candidate shall be dealt with in accordance with the provisions of these Regulations."

Regulation 7 paragraphs (2), (3), (4) & (5) read as follows:—

"(2) No objection to a nomination paper shall be allowed unless it is made to the returning officer between noon and one-thirty o'clock in the afternoon on the day of nomination.

(3) Every objection shall be in writing signed by the objector and shall specify the ground of objection. The returning officer may himself lodge on (*sic*) objection on any of the grounds set out in paragraph (1) of this regulation.

(4) The returning officer shall with the least possible delay after one-thirty o'clock in the afternoon on the day of nomination decide on the validity of every objection and inform the candidate concerned or his proposer or seconder named in the nomination paper provided for in paragraph (2) of regulation 4 of these Regulations of his decision and the grounds thereof.

(5) The decision of the returning officer shall be final and conclusive for the purposes of the election in respect of which the proceedings are being held, and shall not be called in question in any court:

Provided that any person aggrieved by the decision of the returning officer may present an election petition in respect thereof on the grounds set out in paragraph (b) of section 32 of the Election Offences Ordinance, 1954, and the provisions of the said Ordinance shall take effect accordingly."

In this case objections were taken to the nomination papers filed by the petitioner by the first respondent and another. The objections were in writing and complied with the rules. The objections were that the name of the nominee was omitted in the nomination papers and that the said nomination papers

were therefore incomplete and should be rejected as null and void. The second objection was filed by a person named Mah Cheok Tat which reads as follows: "I found that the nomination paper of Datuk Khoo Kay Por has missed his name in the column 'signed by the said nominee'."

On the strength of these objections the Returning Officer rejected the petitioner's nomination papers. The petitioner is now before this court asking the court to rule that the nomination papers were wrongly rejected.

The issue before the court is very simple. It is admitted by the petitioner that in the last line which says "signed by the said nominee" he has not written his name in full after that in the space provided but he has gone on to sign his name in full. So before I decide on the issue as to whether the rejection of the nomination papers by the Returning Officer was correct I must consider the objections. The first objection was that the name of the nominee was omitted in the nomination papers which I cannot accept because the name of the nominee appears at least in three places in the nomination papers as "Khoo Kay Por, Penang". So "Khoo Kay Por" is undoubtedly the name of the nominee and it cannot be argued that his name has been omitted. If the name of the candidate has indeed been omitted from the papers and nobody knew who the candidate who was going to stand for the election was, then, an objection on that ground would have been valid. But that is not the case here. The second objection was that the candidate's name was not inserted in the particular space. If by that omission, there resulted an ambiguity or uncertainty as to who "the said nominee" was there would have been some merit in the objection. But in this case there was no ambiguity or uncertainty as to who "the said nominee" was. Hence I see no substance in the objections.

Now the law on what a nomination paper should contain is contained in Regulation 4 of the Election (Conduct of Elections) Regulations, 1959. So far as the nomination is concerned it reads as follows:—

"4. (1) Any person eligible for election as a member of the Dewan Ra'ayat, or of the Legislative Assembly of a State, in accordance with the provisions of the Constitution of Malaysia, or the Constitution of a State, as the case may be, may be nominated as a candidate for election. The nomination of any other person shall be void.

(2) Candidates shall be nominated by means of nomination papers submitted in triplicate. Each nomination paper shall be signed by a proposer and a seconder respectively and by not less than four other persons all six or more of whose names must appear in the electoral rolls for the constituency for which the candidate seeks election. The written consent of the candidate must be endorsed on each nomination paper which shall be as set out in Form 3 in the First Schedule to these Regulations.

(3) Every candidate shall at the time of his nomination and in the manner described in paragraph (2) of regulation 6 of these Regulations deliver to the returning officer a statutory declaration of his qualifications made and subscribed by him as set out in Form 4 in the First Schedule to these Regulations. If such statutory declaration is not delivered as aforesaid, the nomination of such candidate shall be deemed to be void and the nomination papers shall not be accepted by the returning officer.

(4) The returning officer shall, at any reasonable time between the date of the notice of the writ referred to in regulation 3 of these Regulations and twelve noon on the day of nomination, supply free of charge forms of nomination papers and statutory declarations to any person requiring the same."

Now, in dealing with these questions, the court must always distinguish between form and substance. What is the substance of Regulation 4 of these Regulations. First, that the candidate must be one who is eligible under the Constitution of the State to be nominated as a candidate for election. Then, the candidate must be nominated by means of nomination papers submitted in triplicate and in this nomination paper produced in this court (P1) as the nomination paper of the petitioner I see the name of the candidate appearing in three places. Then the nomination papers shall be signed by a proposer and a seconder respectively and by not less than four other persons all six or more of whose names must appear in the electoral rolls for the constituency for which the candidate seeks election. I see the name of a proposer and a seconder, the number of the polling district and their numbers in the electoral rolls for the Constituency. I see eight other names supporting the candidate giving the numbers of the polling district and their numbers in the electoral rolls for the Constituency. Again the fact that no objection has been taken on any other grounds gives me the right to hold that they are correct and in compliance with the law. The consent of the candidate must be endorsed on each nomination paper which has been done in this case. The other rule says that a statutory declaration must be filed stating that the candidate is eligible for election and is qualified and the fact that no objection has been taken to the statutory declaration filed by him can only mean that the statutory declaration is in order.

Now as I said earlier one must distinguish between form and substance. Forms do not enunciate substantive law but are laid out for convenience for the purpose of recital of particulars to enable the proper authorities who are charged with the responsibility of examining particulars to ensure that rules and regulations have been complied with before they can take action or arrive at a decision. Forms are not sacrosanct. In this case, as far as I can see, all the requirements of substantive law required by Regulation 4 have been complied with and the law has not be contravened. It is admitted that the candidate has not written his name after where it says "Signed by the nominee" but he has signed the full name in the space provided for his signature. Now is the fact that the petitioner's name is omitted in that particular space calculated to mislead or has any substantial effect. The manner of dealing with forms is clearly spelt out in our Interpretation Act, 1967 (No. 23 of 1967) which replaces the Interpretation and General Clauses Ordinance, 1948. Section 62 of the Act of 1967 reads as follows:—

"62. Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead."

Under this formula for interpretation of the effect of deviation from forms provided by Regulation no one can argue that the omission of the candidate to fill up his name in one space as in this case can possibly have any substantial effect or is calculated

to mislead. I hold that the omission has no substantial effect and is not calculated to mislead. Every requirement of regulation 4 has been met in the nomination paper. I am fortified in my decision by the decision of my learned brother Syed Othman J. (as he then was) in *Abdul Karim* v. *Mohamed Taib & Anor.*[1] which has been cited by all parties and everybody is familiar with it. The issue before this court is identical with the issue in that case. I have read my learned brother's judgment carefully and I see no reason not to concur with it and not to support his *ratio decidendi.*

Earlier at the commencement of this hearing a preliminary objection was raised by counsel for the first respondent. The objection was that the regulations relating to security for costs as required under the Election Petition Rules 1954 have not been complied with in that the petitioner had paid one deposit of $500 into court and not to the proper officer as required by the Rules and that the second deposit of $500 was paid although to the proper officer but out of time. Counsel submitted that the petition should be dismissed for this reason.

Counsel for the second respondent conceded to the court that under the Rules no person had been appointed by the Chief Justice to act as a proper officer to receive the deposit. Hence it is abundantly clear that it was not the fault of the petitioner that the first deposit was made to court as there was not in existence a person nominated by the Chief Justice to be a proper officer to receive his deposit for security for costs. As a result of that omission to appoint a person the petitioner had no alternative but to try and pay to some other government officer so that the money would go to government revenue and be available to pay the costs of the respondent if the petition was dismissed. In interpreting the rules of this nature I would follow the proposition of Lord Denning in the case of *Nothman* v. *Barnet London Borough Council*[2]:

"The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach.' He said so in *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.* [1971] A.C. 850, 899; and it was recommended by Sir David Renton and his colleagues in their valuable report on the Preparation of Legislation (1975) Cmnd. 6053, pp. 135/148. In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind."

In this case the petitioner was ready and willing to comply with all the requirements of the Election Petition Rules, 1954 but there was no proper officer appointed under the Rules to receive the deposit. Faced with this situation and cognizant of the time factor involved, he paid the deposit into court i.e. into government revenue. This is where the money would have gone anyhow, even if paid to the proper officer. The Legislature has made these Rules to protect respondents in cases where petitioners bring charges frivolous or otherwise which do not stand up in court and then are unable to compensate respondents who have incurred costs. The purpose of the law is to compel the petitioner to provide security for costs which in this case he has definitely done. The security has been deposited with the government and in case the petition is dismissed there is no danger that the respondent will not receive his costs.

I therefore overruled the objection. Counsel gave notice of appeal against my ruling and requested an adjournment to enable him to appeal to the Federal Court as he submitted that my ruling on the preliminary objection had in fact been a dismissal of his application for the petition to be struck out. He further stated that as at the conclusion of the hearing of this petition any order the court made would be a final order and not be appealable against he would not have the opportunity of bringing his appeal against my interlocutory order before the Federal Court. The court refused the application for adjournment, firstly because there was no merit whatsoever in the preliminary objection, and secondly, if adjournments were granted for counsel to appeal on every ruling on a preliminary objection or objection during a trial, then, every hearing or trial can be frustrated and become incapable of continuing to a conclusion whereby there can be adjudication on the main issues before the court.

As I stated earlier the issue before the court is very simple and not a complicated one. And for the reasons stated above I find that the nomination papers are valid and were wrongly rejected by the returning officer and therefore declare that the candidate Ooi Ean Kwong the first respondent was not duly elected at the said election and that the declaration of the returning officer that the said Ooi Ean Kwong was the duly elected member for the Penang State Constituency of Kampung Kolam is invalid.

I further declare that the nomination forms submitted by the Petitioner Khoo Kay Por were valid and should not have been rejected by the returning officer.

I further order that the returning officer do conduct a fresh election in accordance with the laws for the election of a representative member in the Constituency of Kampung Kolam for the State Legislative Assembly of Penang on the basis of the nomination forms submitted to him on the 21st day of June, 1978, and which have been duly or are herein declared to be valid.

I further order that the returning officer do declare that the candidate obtaining the largest number of valid votes in such fresh poll as the person duly elected to the State Assembly of Penang for the Constituency of Kampung Kolam.

I declare that the election holden on the 8th day of July, 1978 for the State Constituency of Kampung Kolam was void and of no effect.

Under section 36 of the Election Offences Act, 1954 (Revised-1969) (Act 5), I am required to certify to the State Authority that the election the subject of this Petition is void and I shall do so. I must also certify to the State Authority under section 37 of the Election Offences Act, 1954 (Revised-1969) (Act 5) that I have found no evidence of corruption or malpractice which I shall do.

I order that the respondents pay the petitioner costs of this Petition.

Counsel for first respondent requested leave of the court to file an appeal against the court's ruling on the preliminary objection. In view of the fact that such leave would be inconsistent with the finality of the Order made herein the court refused leave to appeal.

Order accordingly.

Solicitors: *K. Vijaya; Karpal Singh & Co.*

QUALITY TRACTORS (M) SDN. BHD. v. UNITED ASIAN BANK BHD.

[O.C.J. (Vohrah J.) January 19, 1979]

[Kuala Lumpur — Civil Suit No. 3379 of 1979]

Practice and Procedure — Costs — Security for costs — Plaintiff company in receivership — Discretion of the court — Companies Act, 1965, s. 351.

The plaintiffs had issued four writs against the defendant bank claiming damages in relation to a number of dishonoured cheques. The bank demanded immediate payment of the sum of $1,008,541.76 cts. alleged to be due to them and as holder of two debentures they appointed Receivers and Managers in respect of the company. In a different suit the plaintiffs obtained an *ex parte* injunction restraining the Receivers and Managers from acting. This injunction was subsequently ordered to be dissolved and an appeal was pending against the order. The defendants applied for an order that the plaintiffs do furnish security for costs in the action.

Held: the question of security for costs is a matter of discretion for the court to be exercised in all the circumstances of the case. In this case in view of all the circumstances the court's discretion should be exercised in favour of the plaintiffs and the application for security for costs should be dismissed.

Cases referred to:-

(1) *Newhart Development Ltd.* v. *Co-operative Commercial Bank Ltd.* [1978] 2 W.L.R. 636.

(2) *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.* [1973] 2 W.L.R. 632.

(3) *R.A. Cripps & Son Ltd.* v. *Wickenden & Anor.* [1973] 1 W.L.R. 944.

(4) *Pearson & Ors.* v. *Naydler & Ors.* [1977] 1 W.L.R. 899.

(5) *Tradestock Pty. Ltd.* v. *TNT (Management) Pty. Ltd. & Ors.* 14 A.L.R. 52.

CIVIL SUIT.

Teh Boon Eng for the plaintiffs.

C. Abraham for the defendants.

Vohrah J. (delivering oral judgment): Counsel for the defendants at the outset indicated that he was proceeding with his application (Enclosure 13) only in so far as it relates to the prayer that the plaintiffs furnish security for costs in this action. As an order that security be provided is a discretionary order I have to consider how my discretion should be exercised in this case.

Some time in November 1977 the plaintiffs issued 4 writs against the defendant bank claiming damages in relation to a number of dishonoured cheques. On January 20, 1978 the bank demanded immediate payment of the sum of $1,008,541.76. On January 23, 1978 the bank as holder of two debentures dated November 4, 1975 and October 15, 1977 appointed Receivers and Managers in respect of the plaintiff company. In a different suit (Civil Suit 638 of 1978) between the same parties, the plaintiffs obtained an *ex parte* injunction restraining the Receivers and Managers from acting. This injunction was ordered to be dissolved on June 26, 1978 and there is now pending an appeal in the Federal Court against the order.

My attention has been drawn to a number of authorities, namely, *Newhart Developments Ltd.* v. *Co-operative Commercial Bank Ltd.*,(1) *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.*,(2) *R.A. Cripps & Son Ltd.* v. *Wickenden & Anor.*,(3) *Pearson & Anor.* v. *Naydler & Ors.*,(4) *Tradestock Pty. Ltd.* v. *TNT (Management) Pty. Ltd. & Ors.*,(5) and also to section 447 of the English Companies Act, 1948 which is *in pari materia* with section 351 of our Companies Act. Reference has also been made to *Kerr* on the Law and Practice as to Receivers (13th Edition). I am obliged to counsel for their diligence in furnishing me with the relevant law.

It was urged by counsel for the defendants that I should make an order for security for costs unless the plaintiffs have made out special circumstances justifying the exercise of discretion in their favour. I consider, however, that it is clear from the majority view in the Court of Appeal in *Parkinson's* case that there is no such restriction on the exercise of the discretion: it is simply a discretion to be exercised in all the circumstances of the case. From the *Tradestock* case it seems that this view has been adopted in Australia with regard to section 363(1) of the Companies Act (*Vic*) which is identical to our section 351 and is *in pari materia* with the English section 447. In that case Smithers J. at page 56 said: —

> "It is clear, however, that the real problem is to determine whether, in the circumstances of that case, the court ought to take the view that the protection should not be afforded to the defendant. No doubt the answer is to be found by ascertaining where, on considerations of what is just and reasonable, the balance rests between the risk of exposing an innocent defendant to the expense of defending his position and the risk of unnecessarily shutting out from relief a plaintiff whose case if litigated would result in his obtaining that relief."

I must say that I cannot find any evidence of *mala fides* on the part of the plaintiffs in bringing their claims. Indeed I note that the defendants have not at any stage suggested or ever hinted that this was the case. Nor has any statement of defence been filed to date. To use the words of Mars-Jones J. in *Parkinson's* case, "nothing I have read or heard has led me to believe that this is anything but a claim put forward in good faith. . .". I have no doubt that the defendants in this case are fully aware that so long as the plaintiff company is in receivership it is unable to control its own finances and that an order for security for costs would almost certainly bring these consolidated claims to an abrupt and final end. It seems to me that it is the very action of the defendants in placing the plaintiff company in receivership which has incapacitated the plaintiffs financially and put them in a position where it would be extremely difficult if not impossible to comply with an order for security for costs. Having considered all the circumstances I am of the view that the court's discretion in this case should be exercised in favour of the plaintiffs and accordingly I affirm the order I made in chambers dismissing the application of the defendants praying for security for costs.

Costs in the cause.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Jagjit Singh & Co.*